IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.199 OF 1996

State of Maharashtra) ... Appellant

Versus

1. Mahiboob @ Daula Babumiya Mujawar, age 48 years.)
2.' Gafar Babumiya Mujawar, age 33 years.)
3. Daud Babumiya Mujawar, age 28 years.
4. Rasool Jafarsaheb Mujawar, age 19 years.)
All residents of 60, Sidheshwar Peth, Solapur.) ... Respondents

Ms. Rajeshree Gadhvi, A.P.P. for the appellant-State.

Mr. Ujwal Agand Surve for the respondents.

CORAM : SMT. RANJANA DESAI, J.

DATED : 10TH SEPTEMBER, 2007.

ORAL JUDGEMENT:-

1. In this appeal, the State of Maharashtra has challenged the judgment and order dated 23/11/1995 passed by the Vth Assistant Sessions Judge, Solapur in Sessions Case No.113 of 1995 whereby the learned Sessions Judge has acquitted the

respondents-accused.

2. The respondents are original accused 1 to 4 respectively. For the sake of convenience, I will refer to them as per their status and description in the trial court. Admittedly, accused 1 is dead and, therefore, the appeal has abated as against him. It survives as against accused 2 to 4.

3. All the accused were tried for offences punishable under sections 307, 323, 504 read with section 34 of the Indian Penal Code (for short, “the IPC”) and section 37(1) of the Bombay Police Act read with section 135 thereof.

4. The prosecution case may shortly be stated. Accused 1 to 4 and the complainant Javid hail from Solapur. There was a dispute between Rahim Salar, who is a cousin of complainant Javid and accused 3 Daud Mujawar. In August, 1994, complainant Javid, his brothers Rahim Salar, Mahamad Ali Salar and Baba Salar assaulted accused Daud with swords and sticks. Therefore, on 24/9/1994, at about 6.30 p.m. when complainant Javid was passing by road on his bicycle for going towards Vijapur Ves and when he

reached near Christ Seva Mandir, Datta Chowk Solapur, accused 1 to 4 went there and assaulted him with sword and knife with an intention to take revenge. All the accused abused him. Accused 4 Rasool Mujawar assaulted him with knife on his lumber region. Accused 1 Mohiboob @ Daula raised a naked sword but he caught hold of the sword with his left hand. Thereafter, accused 2 and 3 beat him with fists. He fell down. The accused ran away. Thereafter, his friends Yusuf Qureshi and Sanjay Shahapurkar saw him lying on the road in an injured condition. They shifted him to Civil Hospital, Solapur. PW-1 Dr. Godale examined him and gave him treatment. At about 6.45 p.m., P.C. Gaikwad informed the incident to PW-7 PHC Kabir Waghmode who was on duty as PSO Police Station Foujdar Chavdi Solapur. PHC Waghmode took entry in the station diary and informed API Kalshetti who was on patrolling duty. He received a message that the injured was serious and admitted in the Civil Hospital. After noting the entries in the station diary, he informed API Kalshetti on wireless. Thereafter, PW-10 PSI Shinde went to the Civil Hospital, Solapur and with the permission of PW-1 Dr. Godale enquired with the injured and recorded his statement (Ex-27). On the basis of the complaint, crime came to be registered. Investigation was set into

motion. After completion of the investigation, the accused came to be charged as aforesaid.

5. In support of its case, the prosecution examined as many as 11 witnesses. PW-1 Dr. Godale and PW-6 Dr. Khedav deposed about the injuries suffered by the complainant and treatment given to him. The prosecution case basically rests on the evidence of the complainant PW-4 Javid. Javid's evidence is sought to be corroborated by evidence of PW-9 Majid and PW-8 Qureshi. Details of investigation have been given by PW-10 PSI Shinde.

6. The defence of the accused was one of denial. Accused 1 and 4 took up the defence of alibi. According to the accused, they are falsely involved in the case on account of enmity between them and the complainant. After perusing the evidence on record, the learned Sessions Judge came to a conclusion that the prosecution has failed to prove its case beyond reasonable doubt. He, therefore, acquitted the accused and, hence, this appeal.

7. I have heard, at some length, Ms. Gadhvi, the learned A.P.P. appearing for the State and Mr. Surve, the learned counsel

appearing for the accused. With the assistance of the learned counsel, I have gone through the evidence and the record of the case.

8. Ms. Gadhvi, the learned A.P.P. contended that the impugned judgment and order is perverse and deserves to be set aside. She submitted that the evidence of PW-1 Dr. Godale clearly establishes that on 24/9/1994, the accused received serious injuries. PW-1 Dr. Godale has issued injury certificate to that effect. Evidence of PW-4 Javid is clear that it is the accused who assaulted him. PW-4 Javid knew the accused very well and, therefore, there is no mistaken identity. The evidence of the complainant PW-4 Javid is cogent and consistent. There is no reason for PW-4 Javid to falsely implicate innocent persons. PW-4 Javid's evidence is supported by the evidence of PW-8 and PW-9. She submitted that in the face of such clinching circumstances, the learned Sessions Judge could not have acquitted the accused. The learned A.P.P. submitted that therefore the judgment and order of acquittal be set aside and the accused be convicted in accordance with law.

9. As against this, the learned counsel for the respondents-

accused submitted that the prosecution has failed to prove its case beyond reasonable doubt and, therefore, the learned Sessions Judge has rightly acquitted the accused. Mr. Surve submitted that admittedly, there was enmity between PW-4 Javid and the accused and possibility of PW-4 falsely implicating the accused cannot be ruled out. He submitted that there are serious discrepancies in the evidence of PW-4, PW-8 and PW-9 and, therefore, the accused could not have been convicted on the basis of the said evidence. He submitted that in any event, the view taken by the trial court is a reasonably possible view and, therefore, it should not be disturbed in an appeal against acquittal. In this connection, the learned counsel relied on the judgment of the Supreme Court in ***Samghaji Hariba Patil v. State of Karnataka, (2006) 10 SCC 494***. The learned counsel, therefore, submitted that no interference is necessary with the impugned order.

10. PW-1 Dr. Godale had examined PW-4 Javid on 24/9/1994 at 7.00 p.m. He found the following injuries on PW-4 Javid.

> *"1. Penetrating injury 2 cm. 1 cm. Elptrical and cavity deep, situated on Rt. Limber region.*

2. Incised wound (skin cut injury) situated on left inner thiener emeuout 4 x 1 cm.

3. Paralld to injury No.2 of equal size.

4. Skin cut injury sitauted on left terminal phylanx of thumb, measuring 1 x 1 cm.'

11. Dr. Godale found injury No.1 to be grievous. He has stated that all the injuries were possible by sharp object like knife or sword. Therefore, the prosecution case that on 24/9/1994 at about 6.30 p.m. PW-4 Javid was assaulted with sharp weapons and he received serious injuries cannot be disputed. PW-4 Javid has stated in his evidence that on 24/9/1994 at about 6.30 p.m. when he reached near Christian Seven Mandir near Datta Chowk, Solapur, the accused came from his back and started abusing him. Accused 4 assaulted him with knife on his lumber region. Accused 1 raised a sword towards him and he caught hold of the sword with his left hand. Thereafter, accused 2 and 3 started beating him with fists. He fell down from his bicycle. The accused kicked him. According to him, Sanju Shahapurkar and Yusuf Qureshi arrived there and took him to the Civil Hospital in an autorickshaw. He has stated that at that time, he was semi conscious. At about 8.00

p.m., PW-10 PSI Shinde came to the hospital and recorded his statement. He signed the said statement. It is at Ex-27. PW-6 Dr. Khedav operated on him. He has further stated that the accused assaulted him because there was a dispute between his brother Rahim Salar and accused 3 Daud Mujawar.

12. PW-9 Munir Majid has stated that on 24/9/1994, at about 6.30 to 6.45 p.m., he was standing near pan shop near Shalimar Talkies. He saw a person running away with knife in his hand towards Khatik Galli. At that time, PW-4 Javid was lying on the road in front of Sanjivani Hospital. He called a rickshaw and with the help of Yusuf Qureshi and Sanjay Shahapurkar sent the injured Javid to the Civil Hospital, Solapur.

13. PW-8 Yusuf Qureshi runs a cycle repair business in front of Shalimar Talkies, Solapur. He has stated that on 24/9/1994 at about 6.45 p.m. he was sitting in his shop. He saw a crowd of persons in front of Shanjivani Nursing Home. At that time, Sanju Shahapurkar was present at his shop for getting his bicycle repaired. He and Sanju went towards the crowd and saw their friend PW-4 Javid lying on the road in front of Sanjivani Nursing

Home. He and Sanju lifted him for carrying him to hospital in a rickshaw. They took him to the Civil Hospital, Solapur.

14. It is pertinent to note that PW-4 Javid has stated that he was in semi-conscious condition and was shifted to hospital by Shahapurkar and PW-8 Yusuf Qureshi and though in his cross-examination he has stated that he had a talk with Sanju Shahapurkar and PW-8 Yusuf Qureshi, PW-8 Yusuf Qureshi in his statement has not stated that PW-4 Javid disclosed the names of the accused to him. If PW-4 Javid had indeed seen the assailants, he would have told the names of the assailants to his friends Sanju and PW-8 Yusuf Qureshi. In his cross-examination PW-4 Javid has admitted that after 4 to 5 minutes, he became unconscious. The fact that he did not tell the names of the assailants to PW-8 Yusuf Qureshi casts a shadow of doubt on the prsoecution story.

15. In his cross-examination, PW-4 Javid has stated that he was unconscious for three days. If that is so, then, his alleged dying declaration recorded on the same day between 8.00 p.m. to 9.00 p.m. becomes suspect. Moreover, in his evidence, PW-4 Javid has

not stated that any Special Executive Magistrate recorded his dying declaration (Ex-19). The fact that PW-4 Javid has not referred to the dying declaration indicates that the prosecution is not coming out with the whole truth. It is also pertinent to note that whereas the complaint (Ex-27) is signed by PW-4 Javid, the dying declaration (Ex-19) bears the thump impression of PW-4 Javid. If PW-4 Javid was conscious and was in a position to give his dying declaration and if on his complaint, he has put his signature, there was no reason why his thump impression is taken on the dying declaration.

16. Evidence of PW-9 Munir Majid also does not inspire confidence. According to him, he saw accused 1 running away with knife in his hand. It is impossible that after the assault, accused 1 would hold the knife in his hand while running away. Moreover, though this witness has stated that he called a rickshaw and with the help of PW-8 Yusuf Qureshi and Sanju Shahapurkar sent the injured to the hospital, PW-8 Yusuf Qureshi has not stated so in his evidence. He has not even referred to the presence of PW-9 Munir Majid. He has avoided to state that PW-9 Munir Majid was serving in the Chappal Mart of Rahim Salar who is the son of

maternal uncle of PW-4 Javid though PW-4 Javid has admitted this fact. The learned Judge has, therefore, rightly observed that PW-9 Munir Majid appears to be a got up witness. The evidence of PW-8 Yusuf Qureshi and PW-9 Munir Majid is therefore not consistent and it does not provide the required corroboration to the evidence of PW-4 Javid.

17. So far as the alleged discovery is concenred, the leanred Judge has rightly disbelieved it. It is pertinent to note that the pancha to discovery panchanama is working in Foujdar Chardi Police Station as sweeper for seven years. He, therefore, is not an independent witness. PW-10 PSI Shinde being the investigating officer interested in the outcome of the case, his evidence cannot be relied upon to establish the prosecution case in the absence of evidence of any other independent witness. In any event, merely on the basis of discovery evidence, the accused cannot be convicted.

18. So far as the blood stains found on the clothes of the accused 4 Rasool are concerned, the muddemal articles were sent to the Chemical Analyser, Pune on 19/11/1994 and there is no

explanation as to why there was delay of about two months in sending the muddemal property to the Chemical Analyser, Pune. There is no evidence to indicate that the muddemal articles were kept in safe custody till they were sent to the Chemical Analyser, Pune. There is no evidence to indicate that the seized articles were properly sealed. In such a situation, it is not safe to rely on the evidence of discovery of articles and the finding of blood stains on the clothes of accused 4 Rasool.

19. It is also important to note that admittedly there was enmity between PW-4 Javid and the accused. This has been so stated by PW-4 Javid in his evidence. Therefore, possibility of false implication of the accused cannot be ruled out. In any event, the view taken by the trial court is a reasonably possible view and the same cannot be disturbed in this appeal against order of acquittal. In the circumstances, the appeal is dismissed.

[SMT. RANJANA DESAI, J.]